Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

PETITIONER'S REPLY BRIEF

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM,
LEVY and MURRAY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorney for Petitioner

Of Counsel:

J. MICHAEL MURRAY
LITA L. WEISS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT

I. NEW YORK'S ARGUMENT, ADVANCED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS IN THIS COURT, THAT THE SIX-HOUR SEARCH OF PETITIONER'S STORE BY ELEVEN STATE OFFICIALS UNDER A CLAIM OF GOVERNMENTAL AUTHORITY WAS NOT SUBJECT TO THE FOURTH AMENDMENT, IS COMPLETELY WITHOUT MERIT 1

A. A Search Conducted In Reliance Upon A Warrant Cannot Later Be Justified On The Ground That No Warrant Was Necessary .. 3

B. The Conduct Of The State Officials Under A Claim Of Government Authority In The Form Of A Search Warrant Was Subject To The Fourth Amendment 6

II. THE JUDGE'S EXAMINATION AT PETITIONER'S STORE, OF SMALL PORTIONS OF EACH OF HUNDREDS OF FILMS AND PUBLICATIONS WAS AN INSUFFICIENT BASIS UPON WHICH TO ORDER THEIR SEIZURE 12

III. THE MASSIVE SEIZURE OF PUBLICATIONS, FILMS AND PROJECTORS VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS 16

CONCLUSION 22

Table of Authorities

PAGE

Cases:

A Quantity of Books v. Kansas, 378 U.S. 205 (1964) ..13, 14, 15, 16, 17, 20
Alderman v. United States, 395 U.S. 165 (1969) 8

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 14
Bumper v. North Carolina, 391 U.S. 543 (1968) 3, 6

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 11

Delaware v. Prouse, —— U.S. ——, 24 Crim. L. Rep. 3079 (1979) 7, 19

Freedman v. Maryland, 380 U.S. 51 (1965) 16

Gouled v. United States, 255 U.S. 298 (1921) 5

Heller v. New York, 413 U.S. 483 (1973) 7, 15, 17, 19, 20
Hoffa v. United States, 385 U.S. 293 (1966) 10

Katz v. United States, 389 U.S. 347 (1967) 8, 9
Kremen v. United States, 353 U.S. 346 (1957) 15

Lewis v. United States, 385 U.S. 206 (1966) 5, 10
Lopez v. United States, 373 U.S. 427 (1963) 10

Mapp v. Ohio, 367 U.S. 643 (1961) 20
Marcus v. Search Warrants, 367 U.S. 717 (1961) 13, 14, 15, 16, 17, 20
Miller v. California, 413 U.S. 15 (1973) 12

Rakas v. Illinois, —— U.S. ——, 99 S.Ct. 421 (1978) 9
Recznik v. City of Lorain, 393 U.S. 166 (1968) 7

PAGE

Speiser v. Randall, 357 U.S. 513 (1958) 14
State v. LaDuca, 89 N.J. Super. 159, 214 A. 2d 423 (N.J. Super. Ct., Appell. Div. 1965) 10

United States v. Branch, 545 F. 2d 177 (D.C. Cir. 1976) 4, 6
United States v. Chadwick, 433 U.S. 1 (1977) 8, 9
United States v. Cunningham, 424 F. 2d 942 (D.C. Cir. 1970), *cert. denied*, 399 U.S. 914 (1970) 4, 6
United States v. Sherwin, 572 F. 2d 196 (9th Cir. 1977), *cert. denied*, —— U.S. ——, 98 S.Ct. 3101 (1978) 11

Von Cleef v. New Jersey, 395 U.S. 814 (1969) 15

Constitutional Provisions:

First Amendment, United States Constitution 14, 20, 21
Fourth Amendment, United States Constitution 2, 3, 4, 6, 7, 8, 9, 19, 20, 21
Fourteenth Amendment, United States Constittuion ..20, 21

Other Sources:

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

—v.—

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE NINTH AND TENTH JUDICIAL DISTRICTS

PETITIONER'S REPLY BRIEF

I.

NEW YORK'S ARGUMENT, ADVANCED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS IN THIS COURT, THAT THE SIX-HOUR SEARCH OF PETITIONER'S STORE BY ELEVEN STATE OFFICIALS UNDER A CLAIM OF GOVERNMENTAL AUTHORITY WAS NOT SUBJECT TO THE FOURTH AMENDMENT, IS COMPLETELY WITHOUT MERIT.

When the eleven state officials invaded the petitioner's store, placed the only employee on the scene under arrest, and proceeded to conduct a six-hour general search of the entire premises, they claimed that their intrusion was authorized and justified by a search warrant which had previ-

ously been issued by Town Justice O'Connor. When the petitioner, in the trial court, moved to suppress the evidence carted away by the eleven state officials, the respondent adhered to this position and argued that the search and seizure had been justified by a validly issued and appropriately executed search warrant. Even in this Court, in its brief in opposition to the petition for certiorari, New York continued to argue that the conduct of its police officers, prosecutors and town justice complied with the Fourth Amendment because the search warrant under color of which it had occurred had been constitutionally proper.

Now, however, in its brief on the merits, the respondent, apparently recognizing the difficulty of its task, offers an altogether different justification for the search and seizure. In its brief on the merits, the respondent does not attempt to defend the search warrant in reliance upon which the state officials acted; the respondent does not argue that there was probable cause for the issuance of the warrant; the respondent does not argue that the warrant satisfied the particularity requirement of the Fourth Amendment. Rather, the respondent now argues that petitioner, as a retail store open to the public, is not entitled to the protection of the Fourth Amendment at all, because it has no reasonable expectation of privacy. As a consequence, respondent argues, it makes no difference whether the warrant was constitutionally proper or not, because the eleven state officials did not need it in order lawfully to search the petitioner's premises.[1] Thus, like the attempt by the respondent's officials to repair the defective general warrant in this case by appending fourteen pages to it after the seizure had already occurred, the respondent now, in an effort to carry the day, seeks to escape the infirmity of

[1] Br. of Resp., pp. 9-18.

the warrant by an after-the-fact claim that it was unnecessary in the first place. However, for the reasons set forth below in subsection A of this argument, this Court should not even consider this claim. Moreover, even if the Court were to consider the merits of the respondent's theoretical claim, the Court should reject the claim as completely without merit, for the reasons advanced below in subsection B of this argument.

A. *A Search Conducted in Reliance Upon a Warrant Cannot Later Be Justified on the Ground That No Warrant Was Necessary.*

The respondent argues hypothetically that because petitioner is a retail store open to the public, the eleven state officials in this case could lawfully have entered the store and viewed the petitioner's merchandise without probable cause and without a warrant, as members of the general public. Had they done so, the respondent asserts, they would have invaded no interest of the petitioner protected by the Fourth Amendment. This Court need not and should not consider this theoretical claim, however, because having relied upon the power and authority of a warrant to invade the petitioner's store and to search it from top to bottom for a six-hour period, the prosecution is in no position now to claim the petitioner's "open" door as authority and justification for the search.

In *Bumper v. North Carolina,* 391 U.S. 543 (1968), police officers appeared at the home the petitioner shared with his grandmother. Petitioner's grandmother met the officers at the front door. When the police announced that they had a search warrant to search the house, petitioner's grandmother told them to go ahead and search. A rifle seized by the police during this search was introduced, over objection, at the petitioner's trial for rape. At the hearing

on the petitioner's motion to suppress, the state disclaimed reliance on the warrant to justify the seizure and argued that the search was authorized by the consent of the petitioner's grandmother. The same argument was made in this Court. This Court rejected that argument, however, holding that:

> "'A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.' *Id.* at 391 U.S. 549 (footnote omitted).[2]

This same principle should operate to prevent New York in the present case from urging that the search conducted by eleven state officials in reliance upon a warrant can now be justified on the basis of the constructive consent the petitioner allegedly manifested to an inspection of its premises, by virtue of the fact that the petitioner, as a retail store, invited the public to enter its premises to transact business. New York, having taken the serious step of invoking its governmental power of search to achieve its law enforcement objectives, may not, in order to escape the Fourth Amendment consequences of having exercised that power, claim, on the basis of an after-the-fact hypothesis, that it could have accomplished the same objectives without invoking its power of search, by an alternative method which would not have invaded any interest of the petitioner protected by the Fourth Amendment.

---

[2] *See also United States v. Cunningham,* 424 F. 2d 942 (D.C. Cir. 1970), *cert. denied,* 399 U.S. 914 (1970) and *United States v. Branch,* 545 F. 2d 177, 186, n. 24 (D.C. Cir. 1976) (a search claimed to be incident to arrest may not be justified, when it turns out that there was a lack of probable cause to arrest, on the basis of a hypothetical claim that, instead of arresting the suspect, the police officer could lawfully have stopped and frisked him and, thereby, have uncovered the same evidence in a manner which did not violate the Fourth Amendment.

There can be no question but that the eleven state officials who invaded petitioner's premises relied upon the power and authority of a search warrant, not upon whatever rights they may have had as members of the general public, to occupy the petitioner's store and search it thoroughly for a six-hour period. They claimed and relied upon governmental power and compulsory process to accomplish their preconceived plan, not upon the petitioner's implied consent to the admission of patrons who may have desired to purchase merchandise. As this Court noted in *Lewis v. United States,* 385 U.S. 206, 211 (1966), a case upon which the respondent relies:

> "A government agent, *in the same manner as a private person,* may accept an invitation to do business and may enter upon the premises *for the very purposes contemplated by the occupant. Of course, this does not mean that whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation* to [*Gouled v. United States,* 255 U.S. 298 (1921)], *is sufficient to dispose of that contention.*" (Emphasis added).

Whatever invitation the petitioner may have extended to the general public to enter its store, it did not include an invitation to seize exclusive control of the premises or to harass other customers or to view films without paying admission or to search for business documents or to tear off the covers of hundreds of publications or to arrest the only employee on the premises. Nor did the petitioner ever give up its right to exclude or remove from its store any patron who would engage in such conduct or otherwise abuse the limited privilege extended to him by the petitioner to enter the store.

By arguing that the search in this case should be upheld without regard to the validity of the warrant in reliance upon which it occurred, the respondent is asking this Court not only to disregard completely the facts of this case, but to assume and speculate that the eleven state officials could have acted in the same manner without the power of a warrant or a show of governmental force. *Compare United States v. Cunningham,* 424 F.2d 942 (D.C. Cir. 1970), *cert, denied* 399 U.S. 914 (1970); *United States v. Branch,* 545 F.2d 177, 186, n. 24 (D.C. Cir. 1976). In fact, however, absent the compulsory process of a search and arrest warrant and absent a claim of governmental authority, it is clear that the petitioner would never have allowed the state officials or anyone else, claiming the rights of the general public, to engage in any of the conduct which took place during the six-hour siege of petitioner's store.

Accordingly, this Court should not even consider New York's claim that the conduct of its officials in reliance upon a warrant was not subject to the Fourth Amendment. Having invoked the governmental power of search to accomplish its objectives, the respondent cannot avoid the Fourth Amendment consequences of the exercise of that power. *See Bumper v. North Carolina, supra.*

B. *The Conduct of the State Officials Under a Claim of Governmental Authority in the Form of a Search Warrant Was Subject to the Fourth Amendment.*

Even if this Court should reach the merits of respondent's claim, that claim should be rejected as completely without merit. The basic thrust of the respondent's argument is that a retail store open to the public has no reasonable expectation of privacy as to any area of the store to which the public is admitted.[3] Consequently, the respondent argues, the state officials in this case did not need a valid warrant or probable cause to enter the petitioner's store and view the merchandise offered for sale or exhibition by the petitioner. Rather, they could have claimed the right to enter the store and view the merchandise as members of the general public, unhampered by the restrictions of the Fourth Amendment until such time as they actually effected a seizure. Whatever the validity might be of such an argument in a case where a state official appears on the premises of a retail business open to the public, claiming no greater right to be there than that of any other customer, *compare Heller v. New York,* 413 U.S. 483 (1973), the argument simply has no relevance to the present case, because that is not what happened here.

[3] Br. of Resp., p. 12.

In the present case, the eleven state officials who invaded petitioner's store did so, from the very beginning, and at every step of the way, under a claim of governmental authority in the form of a search warrant and an arrest warrant. Upon entering the store, they immediately placed the only employee on the premises under arrest and informed him that they had with them a search warrant authorizing a search of the entire store. They placed uniformed guards both inside and outside the store and deterred any members of the public from entering by compelling them to display identification. In short, as soon as they entered under a claim of official right, the eleven state officials closed the store and, within the meaning of the Fourth Amendment, seized it and its entire contents for the duration of their six-hour search. *Compare Delaware v. Prouse,* —— U.S. ——, 24 Crim. L. Rep. 3079, 3081 (1979).[4]

[4] The expectation of privacy reasonably held by the petitioner at this point was that of a store closed to the public rather than that of a store open to the public. *Compare Recznik v. City of Lorain,* 393 U.S. 166 (1968).

Moreover, the six-hour search that followed the initial seizure of the store and which took place under compulsion of a search warrant was a governmental search in the truest sense of the word and bore no resemblance to the kind of inspection that could have been made by a prospective customer. The record in this case demonstrates that the state officials, claiming the authority of a search warrant, roved from one section of the store to another, viewing segments of films without paying the admission price; leafing through magazines and books with a view toward seizing them, not buying them; ripping off the plastic covers that completely enclosed hundreds of publications and stacking the publications in piles on the floor, a search and seizure under any definition of those words;[5] ransacking a multitude of films and other items behind a glass case in the counter area; and rifling through a box of business documents. At all times throughout the six-hour search, the only employee in the store was under arrest and the store was under the exclusive and complete control of the state.

The respondent argues that none of this conduct, however, was subject to the commands of the Fourth Amendment. Stated simply, the respondent argues that by engaging in a retail business open to the public, the petitioner abandoned its Fourth Amendment right to be free from the kind of police action which occurred in this case. Indeed, by a restrictive reading of *Katz v. United States,* 389 U.S. 347 (1967), a case universally regarded as having expanded the scope of protection afforded by the Fourth Amendment,[6] the respondent would declare an open season on all commercial enterprises which do business with the public.

[5] *See United States v. Chadwick,* 433 U.S. 1 (1977).

[6] *See Alderman v. United States,* 395 U.S. 165, 176-180 (1969); Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 385 (1974).

In *Katz,* this Court rejected the notion that the Fourth Amendment protects only against governmental intrusions accomplished by means of a trespass or physical intrusion into an enclosure. This Court held that the Fourth Amendment protects people, not areas, from governmental invasions of reasonably held expectations of privacy. The Court was quick to note, however, that the Fourth Amendment "... cannot be translated into a general constitutional 'right to privacy' ..." and that "... its protections go further, and often have nothing to do with privacy at all. ..." *Id.,* at 389 U.S. 350.

The respondent reads *Katz,* and subsequent decisions of this Court recognizing that the Fourth Amendment protects reasonable expectations of privacy,[7] as a restriction, rather than an expansion, of the scope of protection afforded by the Fourth Amendment. In particular, the respondent urges that the Fourth Amendment protects *only* privacy interests, which respondent narrowly defines as an interest in secrecy.[8] Under this view, a retail business which opens its doors to the public abandons any reasonable expectation of privacy (i.e., secrecy) it may have had in its premises and sheds its Fourth Amendment right to be free from unwarranted government invasion of its premises and interference with its business, regardless of the nature and scope of the intrusion. This view is completely without merit.

Whatever it is labelled, the petitioner here had a reasonable expectation, protected by the Fourth Amendment, that its commercial establishment would be secure from an unwarranted intrusion by government officials claiming

[7] *See United States v. Chadwick,* 433 U.S. 1 (1977); *Rakas v. Illinois,* —— U.S. ——, 99 S.Ct. 421 (1978).

[8] Br. of Resp., pp. 10, 12.

official power to assume dominion and control over the store. Whether or not the petitioner, by opening its doors to the public, assumed the risk that one or more of its paying customers would actually be a state official,[9] the petitioner by no means surrendered its reasonable expectation that it would be free from arbitrary invasion by government officials, not claiming the right of a customer, but claiming the superior right of official authority to search the store.

What the eleven state officials accomplished during their six-hour siege of petitioner's store, under authority of a search warrant, could never lawfully have been accomplished by a member of the public who accepted the petitioner's invitation to enter the store and purchase merchandise offered for sale or exhibition. No private citizen lawfully could have entered the premises in a show of force. No private citizen lawfully could have placed the only employee there under custody, and then proceed to insist upon the right to take the names of other customers, to see films without paying for them, to examine private business records, to rip off the covers of hundreds of publications and to occupy the premises for a six-hour period. *See State v. LaDuca,* 80 N.J. Super. 159, 214 A. 2d 423 (N.J. Super. Ct., Appell. Div. 1965). Indeed, had a private citizen attempted to do what the state officials in the present case did, petitioner justifiably could have called upon those very same state officials to come to petitioner's store and protect its property by enforcing the law against the private citizen.

Clearly, the petitioner had a reasonable expectation that the security of its premises would not be invaded in the

[9] *See Lewis v. United States,* 385 U.S. 206 (1966); *Hoffa v. United States,* 385 U.S. 293 (1966); *Lopez v. United States,* 373 U.S 427 (1963).

manner that it was. And it is precisely that kind of interest which the Fourth Amendment protects. Accordingly, the respondent's contention that the six-hour search of the petitioner's store was not subject to, and need not be measured by, the commands of the Fourth Amendment, is patently frivolous.[10]

[10] Even the respondent concedes that the seizure of over 920 items from petitioner's store was subject to the Fourth Amendment. What is unclear, however, is how the respondent claims the seizure was lawful. The respondent alludes to, but does not rely upon, the plain view doctrine. Nor could the respondent rely upon that doctrine, since the state officials were not lawfully in the place from which they gained their view of the materials seized; since, far from discovering these materials inadvertently, the officials invaded petitioner's store for the very purpose of searching for and seizing the materials they knew they would find; and since the alleged incriminating nature of the materials was certainly not immediately apparent. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Furthermore, the plain view exception to the warrant requirement has no application to the seizure of expressive material. *United States v. Sherwin,* 572 F. 2d 196 (9th Cir. 1977), *cert. denied,* —— U.S. ——, 98 S.Ct. 3101 (1978). The respondent appears to rely upon the magistrate's presence at the store and supervision of the seizure as a basis for upholding the seizure. As petitioner demonstrated in its opening brief, at pp. 32-35, however, the seizure cannot be justified on that basis.

II.

THE JUDGE'S EXAMINATION AT PETITIONER'S STORE OF SMALL PORTIONS OF EACH OF HUNDREDS OF FILMS AND PUBLICATIONS WAS AN INSUFFICIENT BASIS UPON WHICH TO ORDER THEIR SEIZURE.

The respondent does not take issue with the petitioner's account of Judge O'Connor's "examination" of the films and publications at petitioner's store. More specifically, the respondent concedes that the judge ordered the seizure from petitioner's store of every copy of numerous films on the basis of his having viewed isolated and minute segments of them; every copy of hundreds of publications on the basis of a two to ten second glimpse of "two or three pages, half a dozen pages" [11] of each; and every copy of numerous other films based solely upon a glance at the small still photograph on each of the boxes in which the films were contained.[12] In no instance did the judge inspect any film or publication in its entirety. The respondent, nevertheless, argues that the judge fulfilled his obligation to focus searchingly on the question of obscenity before removing these materials from the marketplace, despite this Court's clear pronouncement that a finding of obscenity can only be based upon a consideration of a work as a whole. *Miller v. California,* 413 U.S. 15 (1973).

The respondent argues that the focusing search on obscenity which this Court has prescribed as the constitutional prerequisite to a lawful seizure of expressive material does not mean that a magistrate, before ordering the seizure of a book or film, must necessarily review the entire item in question or even a substantial portion of it.

[11] Tr. 98.

[12] *See* Br. of Resp., pp. 23-24.

Rather, a quick and casual glimpse at a small fragment of the work in question may, in a given case, satisfy the constitutional requirements established by this Court.

The respondent argues that the extent to which a magistrate must focus searchingly on the question of the obscenity of a work before ordering it seized depends, in part, upon the nature and extent of the restraint that would be imposed by the contemplated seizure.[13] However, such an analysis would hardly help the respondent in this case, because here the seizure ordered by the judge was particularly repressive. In this case, the judge ordered the seizure of every copy of hundreds of films and publications, a type of seizure that this Court has characterized as imposing the most effective and final restraint possible. *Marcus v. Search Warrants,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). The judge here completely and totally removed from the marketplace hundreds of films and publications and thereby accomplished a result which this Court has held lawfully can be accomplished *only* after an adversary hearing on the question of obscenity. *Marcus, supra; A Quantity of Books, supra.* Thus, if, as the respondent suggests, the extent to which a magistrate must focus searchingly on the question of obscenity depends upon the kind of restraint that would be imposed by the contemplated seizure, then the magistrate's burden to review the materials in this case in their entirety was greater, not lesser.

The respondent also argues that the kind of review constitutionally required of a magistrate depends upon the nature of the materials themselves and the location where the materials are being offered for sale. More specifically, the respondent argues that when the materials in question

[13] Br. of Resp., pp. 21-22.

are sexually oriented and are being offered for sale at an adult bookstore, a hasty examination of minute portions of each item is constitutionally adequate.[14] Exactly the opposite is true, however, for it is precisely with respect to sexually oriented materials that the line separating obscenity from constitutionally protected speech is most "dim and uncertain." [15] It is precisely when a magistrate reviews sexually oriented materials that he needs to employ "sensitive tools" [16] in the performance of his constitutional task.

Moreover, the variable and flexible *procedural* rule urged by New York would afford insufficient protection to materials *substantively* protected by the First Amendment. While this Court has recognized the power of the states to regulate obscenity, this Court has been ever watchful to require the states to adopt procedures for the exercise of that power which cannot readily be used to suppress non-obscene material. Thus, whenever this Court has been asked to approve a state procedure for the enforcement of obscenity laws, the Court has always applied the same test: whether the procedure in question includes sufficient safeguards to minimize the risk that its use would, or easily could, result in the suppression of non-obscene material. *Marcus, supra; A Quantity of Books, supra.* The procedure used by New York in this case falls far short of meeting that standard.

The approval of a procedure by which films and publications are seized on the basis of a rapid and fleeting review of small segments of each would jeopardize a vast bulk of materials entitled to First Amendment protection. Under such a procedure, a multitude of films and publications

[14] Br. of Resp., p. 22.

[15] *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963).

[16] *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

legitimately dealing with the important topic of sex would be subject to seizure. If this Court's repeated insistence upon procedures designed to focus searchingly on the question of obscenity prior to seizure of expressive material means anything, it must mean that a magistrate has to consider a work as a whole, either by reviewing it himself in its entirety or by studying an affidavit which fully sets forth the entire contents of the work, before ordering it removed from the marketplace. *See Marcus, supra; A Quantity of Books, supra; Heller v. New York,* 413 U.S. 483 (1973). Because the judge in the present case altogether failed to review adequately the materials he ordered seized from petitioner's store, the petitioner's conviction should be reversed.[17]

[17] New York points out that petitioner was convicted on three counts and urges that it might be appropriate for this Court to reverse less than all three counts by holding that Judge O'Connor's initial inspection of some of the materials was constitutionally adequate even if his inspection of other materials was not. The petitioner disagrees. First, the judge failed to focus searchingly on *any* item he ordered seized. Second, the massive seizure here cannot, by an after-the-fact review, be artificially multiplied into three distinct episodes. Rather, if any part of this enormous and indiscriminate seizure was unlawful, the entire seizure was necessarily tainted. *See Kremen v. United States,* 353 U.S. 346 (1957); *Von Cleef v. New Jersey,* 395 U.S. 814 (1969).

III.

THE MASSIVE SEIZURE OF PUBLICATIONS, FILMS AND PROJECTORS VIOLATED PETITIONER'S FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

This Court has recognized that the seizure of all copies of a publication or film represents the most effective and repressive final restraint upon the circulation of expressive materials possible. *Marcus v. Search Warrants,* 367 U.S. 713 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964). Since a final restraint lawfully can be imposed only following an adversary judicial proceeding on the issue of obscenity, *Freedman v. Maryland,* 380 U.S. 51 (1965), this Court has held that a seizure of all copies of a book or film may lawfully be effected only if it is *preceded* by an adversary hearing on the question of obscenity. *Marcus, supra; A Quantity of Books, supra.* Under this Court's decisions, it is clear, therefore, that the seizure of all copies of hundreds of publications and films in this case prior to any adversary hearing was unlawful.

The respondent argues, however, that the following language contained in the search warrant, under authority of which the repressive seizure in this case occurred, rendered the principles established by this Court's decisions inoperative:

> ". . . The Court hereby specially determines that this Warrant shall constitute notice to any persons arrested or charged pursuant to its execution, that they are entitled to immediate adversary hearing, as soon as practicable, so that a determination can be made as to whether or not the material seized was possessed in violation of Article 235 of the Penal Law."

The respondent argues that this language in the warrant gave its officials a license to engage in conduct during the raid of petitioner's store far in excess of that which could possibly have served any legitimate law enforcement purpose and entitled them to seize an enormous number of items not needed for any valid evidentiary purpose.[18] This argument is completely without merit.

In *A Quantity of Books, supra,* this Court was presented with an identical argument. In that case, it was argued that the massive seizure there should be upheld because the commercial establishment from which the books were seized was afforded a full hearing following the seizure, pursuant to a notice of hearing contained in the warrant. This Court rejected that argument, however, and held at 378 U.S. 212-213:

> "Nor is the order under review saved because after all 1715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels. *For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books.*" [Citations omitted] (Emphasis added).

Moreover, in *Heller v. New York,* 413 U.S. 483 (1973), this Court promised that any large scale seizure of expressive material would be scrutinized by courts ". . . to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met", *id.* at 413 U.S. 491, and to be certain that the purpose of a seizure is not to block distribution of materials presumptively protected by the First

[18] Br. of Resp., p. 27.

Amendment, but is merely to preserve as evidence the single copies of books or films needed for prosecution. The respondent claims that the purpose of the seizure in this case was not to block circulation of the hundreds of films and publications seized at petitioner's store but merely to preserve evidence needed for prosecution.[19] This claim is altogether belied by the record before this Court.

The respondent does not, and cannot, explain the evidentiary purpose served by the seizure of additional copies of the only two films specifically identified in the warrant and which the state already had in its possession before it even entered petitioner's store to execute the warrant. In fact, the only purpose served by the seizure of additional copies of those films was to block their exhibition.

The respondent defends the seizure of four coin boxes attached to the booths in which patrons could view films being exhibited by the petitioner as necessary to prove that petitioner "promoted" the films exhibited by it.[20] Although not expressly stated in its brief, presumably the respondent would defend the seizure of 26 film projectors on the same basis. The respondent's claim is utter nonsense, however. Proof of promotion derives from the fact that petitioner was a retail store open to the public and charged an admission price for viewing films and charged a purchase price for the sale of films and publications. Ten law enforcement officers and a magistrate were available to prove those facts beyond a shadow of a doubt by their testimony in open court. Clearly, the only purpose served by the seizure of the coin boxes, and particularly by the seizure of every one of the petitioner's film projectors, was to

[19] Br. of Resp., pp. 28-32.

[20] Br. of Resp., p. 29.

guarantee that the petitioner would be unable to exhibit *any* films to the public, regardless of their content.

The respondent defends the harassment of prospective customers by the police on the ground that "these people were potential witnesses at a suppression hearing." (Br. of Resp., p. 30). That contention is absurd. What relevant testimony could prospective customers possibly have given at the suppression hearing? The only purpose served by compelling prospective customers to display identification[21] was to harass them, to insure that the petitioner's store remained closed during the six-hour search, and to discourage the customers from returning at a later date. The complete invalidity of the respondent's contention that prospective customers were viewed as potential state witnesses at a suppression hearing is amply demonstrated by the fact that not a single one of them was ever called to testify when the suppression hearing in this case was held.

Finally, the respondent defends the seizure of all copies of hundreds of films and publications by pointing to a New York statute which establishes a presumption that one who possesses six or more identical or similar copies of an obscene article intends to promote such article.[22] In *Heller, supra,* this Court anticipated that such a claim might be made to justify a seizure of more than the one copy of a film or publication legitimately needed for evidentiary purposes. This Court made it clear that it would reject such a claim:

[21] This procedure clearly constituted a seizure of those citizens within the meaning of the Fourth Amendment. *Delaware v. Prouse,* —— U.S. ——, 24 Crim. L. Rep. 3079, 3081 (1979).

[22] Br. of Resp., p. 31.

> "... This is not to say that multiple copies of a single film may be seized as purely cumulative evidence, or that a State may circumvent *Marcus* or *A Quantity of Books* by incorporating, as an element of a criminal offense, the number of copies of the obscene materials involved." *Heller, supra,* at 413 U.S. 492, n. 8.

The mass seizure which occurred in the present case was clearly unlawful under the First, Fourth and Fourteenth Amendments. The respondent argues additionally, however, that even if that is the case, the proper remedy would have been the return to petitioner of all extra copies of the seized materials, not suppression of all fruits of the seizure. That being the case, the respondent argues, the petitioner's conviction may be affirmed notwithstanding the constitutional violation perpetrated by the mass seizure.[23] The petitioner disagrees for three reasons.

First, in *Marcus* and *A Quantity of Books,* this Court found it necessary to reverse the judgments, obtained after trial in those cases, ordering the destruction of materials found to be obscene, in order to vindicate the First and Fourteenth Amendment rights that had been abridged by the mass seizures that had occurred. Here, too, a violation of the First and Fourteenth Amendments infected the proceedings, necessitating a reversal of petitioner's conviction.

Second, for the reasons set forth in petitioner's opening brief at p. 44, the mass seizure here violated the Fourth Amendment as well as the First Amendment. Thus, the appropriate remedy is suppression of all items seized. *Mapp v. Ohio,* 367 U.S. 643 (1961).

---

[23] Br. of Resp., p. 32.

Third, the constitutional values which are denigrated by an unlawful mass seizure cannot adequately be vindicated by anything less than a condemnation of the entire seizure and suppression from evidence of all of its fruits. In such a case, it is insufficient merely to order the return of the extra copies of the seized materials, while permitting the state to retain one copy of each seized film and publication for use as evidence at a criminal trial. If that were the only remedy afforded for an illegal mass seizure, law enforcement officers would have no incentive to limit seizure of expressive material to the single evidentiary copy needed for prosecution. They could seize multiple copies of allegedly obscene materials safe in the knowledge that they could block the distribution and circulation of films and publications offensive to them for a period of time without in any way jeopardizing any criminal prosecution which results.

Mass seizures of allegedly obscene materials are impermissible precisely because they impose prior restraints on the circulation of expressive materials, in violation of the First Amendment. If the only remedy for such a violation were the eventual lifting of the prior restraint, by return of the copies not needed for prosecution upon adjudication of an independent lawsuit or upon hearing of a motion to suppress, there would be no effective deterrent to the effectuation of mass seizures by law enforcement officers. Those who would use the search and seizure power to suppress the dissemination of unpopular ideas could do so successfully, without having to suffer any adverse consequences. Accordingly, only suppression of all evidence obtained in the course of an illegal mass seizure adequately vindicates the First, Fourth and Fourteenth Amendments. The petitioner's conviction should, therefore, be reversed.

CONCLUSION

For the reasons stated in its opening brief and upon the authorities and argument presented in this reply brief, petitioner respectfully urges the Court to reverse petitioner's conviction.

Respectfully submitted,

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM,
LEVY and MURRAY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorney for Petitioner

Of Counsel:

J. MICHAEL MURRAY
LITA L. WEISS

April, 1979.